Radhakrishnan a/l Alagamalai & Anor v Muhammad Zamri Vinoth bin Kalimuthu & Ors

HIGH COURT (KUALA LUMPUR) — SUIT NO WA-22NCVC-296-04 OF 2021
MOHD ARIEF JC
17 JANUARY 2022

Civil Procedure — Striking out — Application for — Plaintiffs claimed against defendants premised on words and statements uttered by first defendant — Defendants applied to strike out plaintiffs' claim — Whether claim for defamation against group of individuals or against religion existed — Whether plaintiffs pleaded or showed reasonable cause of action

The plaintiffs as representatives of associations known as 'Pertubuhan Hindudharma Malaysia' and 'Majlis Belia Hindu Malaysia' claimed against the defendants premised on words and statements that were allegedly uttered by the first defendant on YouTube and Facebook. The plaintiffs alleged that the statements had harassed Malaysian Hindus and had oppressed the Hindu religion in Malaysia. The plaintiffs had since lodged police reports with the second defendant, but the second defendant failed to take any relevant action against the first defendant. As a result, the plaintiffs alleged, inter alia, the following against the first defendant: (a) that the first defendant was guilty of negligence by maliciously and with bad faith to disparage or defame the Hindu religion and in trying to spread false information of the Hindu religion; and (b) that the first defendant had caused racial conflict within Malaysia. The plaintiffs' claim against the second defendant was for the alleged failure to act against the first defendant under s 20 of the Police Act 1967 ('the Act'). The plaintiff's claim against the third and fourth defendants were also premised on the failure to act against the second defendant and their vicarious alleged failure to stop the alleged harassment, insult or disparagement against the Hindu religion and/or Malaysian Hindu. The defendants had filed notice of applications to strike out the plaintiffs' claim. The defendants opined that: (i) the statement of claim filed against them did not disclose a reasonable cause of action against them; (ii) the claim was scandalous, frivolous or vexatious; and (iii) the claim was an abuse of process of court.

Held, allowing the defendants' applications with costs:

(1) The plaintiffs alleged that the first defendant was guilty of negligence by causing disrepute to the Hindu religion and Malaysian Hindus and they did provide particulars of the purported act of negligence. The plaintiffs' claim was akin to a claim for libel or slander but it was intended to protect

the reputation of the Hindu religion or those who profess the said faith in Malaysia. The plaintiffs did not plead a valid cause of action against the first defendant. These was no such cause of action that was recognised under Malaysian law. The law of defamation did not extend to the protection of a religion or a group professing the said religious belief or even blasphemy (see paras 24–26).

(2) The plaintiffs alleged that the second to fourth defendants were in breach of their statutory duties under the Police Act 1967 ('the Act'), in particular s 20 of the Act or by virtue of the protection afforded by the Federal Constitution. The Act did not create any statutory duty that was enforceable by a private cause of action. Neither was a tort of negligence recognised in law for failure to exercise the powers afforded to the police to investigate and detain any persons in accordance with Malaysian law. It was not for the plaintiffs to direct the police how to conduct their investigation. The powers afforded to the police was not created specifically to protect the plaintiffs or the class of persons they represented but it was given to the police to protect the public at large. The plaintiffs had not pleaded a reasonable cause of action against the second to fourth defendants. There was no existence of any right to institute a private claim to enforce the powers afforded to the police under the Act, the Criminal Procedure Code as well as the Penal Code. There was no common law duty to act immediately on the reports by the plaintiffs or any such person. It was up to the police and the relevant authorities to act based on the complaints lodged. It was not in the interest of the Malaysian public to impose such duties against the police to act at the whims and fancies of an individual or group of individuals. Therefore, the claim was frivolous, vexatious and was an abuse of process of the court (see paras 36, 47–48 & 51–54).

(3) The plaintiffs must show that they were attempting to protect an interest of his own or any interference with their private right. Such a cause of action could not be seen based on the statement of claim filed by the plaintiffs. The plaintiffs had also failed to plead that they had suffered or would suffer special damages because of the defendants' actions (see paras 65–66).

[Bahasa Malaysia summary

Plaintif sebagai wakil persatuan dikenali sebagai 'Pertubuhan Hindudharma Malaysia' dan 'Majlis Belia Hindu Malaysia' mendakwa terhadap defendan berdasarkan kata-kata dan kenyataan yang didakwa diucapkan oleh defendan pertama di YouTube dan Facebook. Plaintif mendakwa bahawa kenyataan tersebut telah mengganggu penganut Hindu Malaysia dan telah menindas agama Hindu di Malaysia. Plaintif telah membuat laporan Polis dengan defendan kedua, tetapi defendan kedua gagal mengambil sebarang tindakan berkaitan terhadap defendan pertama. Akibatnya, plaintif mendakwa, antara

lain, perkara berikut terhadap defendan pertama: (a) bahawa defendan pertama adalah bersalah atas kecuaian dengan niat jahat untuk mencela atau memfitnah agama Hindu dan dalam cubaan menyebarkan maklumat palsu mengenai agama Hindu; dan (b) bahawa defendan pertama telah menyebabkan konflik kaum di Malaysia. Tuntutan plaintif terhadap defendan kedua adalah atas dakwaan kegagalan bertindak terhadap defendan pertama di bawah s 20 Akta Polis 1967 ('Akta'). Tuntutan plaintif terhadap defendan ketiga dan keempat juga berdasarkan kegagalan untuk bertindak terhadap defendan kedua dan kegagalan wakil mereka untuk menghentikan dakwaan gangguan, penghinaan atau pencelaan terhadap agama Hindu dan/atau Hindu Malaysia. Defendan telah memfailkan notis permohonan untuk menolak tuntutan plaintif. Defendan berpendapat bahawa: (i) pernyataan tuntutan yang difailkan terhadap mereka tidak mendedahkan kausa tindakan yang munasabah terhadap mereka; (ii) tuntutan itu adalah bersifat skandal, remeh atau menyusahkan; dan (iii) tuntutan itu adalah penyalahgunaan proses mahkamah.

Diputuskan, membenarkan permohonan defendan dengan kos:

(1) Plaintif mendakwa bahawa defendan pertama bersalah atas kecuaian dengan menyebabkan mencemarkan nama baik agama Hindu dan Hindu Malaysia dan mereka telah memberikan butir-butir mengenai perbuatan yang dikatakan cuai itu. Tuntutan plaintif adalah serupa dengan tuntutan untuk libel atau fitnah tetapi ia bertujuan untuk melindungi reputasi agama Hindu atau mereka yang menganut kepercayaan tersebut di Malaysia. Plaintif tidak memplid kausa tindakan yang sah terhadap defendan pertama. Tiada kausa tindakan seperti tersebut yang diiktiraf di bawah undang-undang Malaysia. Undang-undang fitnah tidak meliputi perlindungan agama atau kumpulan yang menganut kepercayaan agama tersebut atau bahkan menghina agama (lihat perenggan 24–26).

(2) Plaintif mendakwa bahawa defendan kedua hingga keempat telah melanggar kewajipan berkanun mereka di bawah Akta, khususnya s 20 Akta atau berdasarkan perlindungan yang diberikan oleh Perlembagaan Persekutuan. Akta itu tidak mewujudkan sebarang kewajipan berkanun yang boleh dikuatkuasakan oleh kausa tindakan peribadi. Satu kesalahan kecuaian juga tidak diiktiraf dalam undang-undang untuk kegagalan menjalankan kuasa yang diberikan kepada Polis untuk menyiasat dan menahan mana-mana orang mengikut undang-undang Malaysia. Ia bukan untuk plaintif mengarahkan Polis bagaimana untuk menjalankan siasatan mereka. Kuasa yang diberikan kepada Polis tidak diwujudkan khusus untuk melindungi plaintif atau kelas orang yang mereka wakili tetapi ia diberikan kepada Polis untuk melindungi orang awam secara amnya. Plaintif tidak memplid kausa tindakan yang munasabah terhadap defendan kedua hingga keempat. Tidak wujud sebarang hak untuk

memulakan tuntutan persendirian untuk menguatkuasakan kuasa yang diberikan kepada Polis di bawah Akta, Kanun Tatacara Jenayah serta Kanun Keseksaan. Tiada kewajipan undang-undang am untuk bertindak segera ke atas laporan oleh plaintif atau mana-mana orang sedemikian. Terpulang kepada Polis dan pihak berkuasa yang berkenaan untuk bertindak berdasarkan aduan yang dibuat. Ia bukan kepentingan orang awam Malaysia untuk mengenakan kewajipan sedemikian terhadap Polis untuk bertindak mengikut kehendak individu atau kumpulan individu. Oleh itu, tuntutan tersebut adalah remeh, menyusahkan dan merupakan penyalahgunaan proses mahkamah (lihat perenggan 36, 47–48 & 51–54).

(3) Plaintif mesti menunjukkan bahawa mereka cuba melindungi kepentingannya sendiri atau sebarang gangguan terhadap hak persendirian mereka. Kausa tindakan sedemikian tidak dapat dilihat berdasarkan pernyataan tuntutan yang difailkan oleh plaintif. Plaintif juga telah gagal untuk memplid bahawa mereka telah atau akan mengalami ganti rugi khas kerana tindakan defendan (lihat perenggan 65–66).]

Cases referred to

Atip bin Ali v Josephine Doris Nunis & Anor [1987] 1 MLJ 82; [1986] CLJ Rep 283 (folld)

Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36; [1993] 4 CLJ 7, SC (refd)

Bank Negara Malaysia v Mohd Ismail & Ors [1992] 1 MLJ 400, SC (refd)

Crimmins v Stevedoring Industry Finance Committee (1999) 200 CLR 1, HC (refd)

Guaranty Trust Co of New York v Hannay & Co [1915] 2 KB 536, CA (refd)

Haris Fatillah bin Mohd Ibrahim v Suruhanjaya Pilihan Raya Malaysia [2017] 3 MLJ 543; [2017] 3 CLJ 88, CA (refd)

Hill v Chief Constable of West Yorkshire [1989] AC 53, HL (consd)

Home Office v Wainwright and another [2001] EWCA Civ 2081, CA (refd)

Kerajaan Malaysia & Ors v Lay Kee Tee & Ors [2009] 1 MLJ 1; [2009] 1 CLJ 663, FC (refd)

Ledchumanan Nagappan v R Nadarajah & Ors [1993] MLJU 304; [1993] 4 CLJ 253, HC (refd)

Lim Cho Hock v Government of the State of Perak, Menteri Besar, State of Perak and President, Municipality Of Ipoh [1980] 2 MLJ 148, HC (refd)

Malone v Metropolitan Police Commissioner [1979] Ch 344, Ch D (refd)

Ong Boon Hua @ Chin Peng suing (in his own capacity as a representative of all members of Parti Komunis Malaya and other related parties) & Anor v Kerajaan Malaysia [2010] 2 MLJ 794; [2010] 3 CLJ 125, HC (refd)

Osman and another v Ferguson and another [1993] 4 All ER 344, CA (consd)

Pemilik-Pemilik dan/atau Pencarter-Pencarter Demis Tongkang atau Vesel

'Wantas 17' v Pemilik-Pemilik Kapal atau Vesel 'My Ferry 2' [2021] MLJU 738; [2021] 1 LNS 666, CA (refd)
Tan Sri Haji Othman Saat v Mohamed bin Ismail [1982] 2 MLJ 177, FC (refd)
Tengku Jaafar bin Tengku Ahmad v Karpal Singh [1993] 3 MLJ 156; [1993] 4 CLJ 183, HC (refd)
X (minors) v Bedfordshire County Council, M (a minor) v Newham London Borough Council, E (a minor) v Dorset County Council [1995] 2 AC 633, HL (refd)

Legislation referred to

Criminal Procedure Code
Federal Constitution arts 3, 11
Police Act 1967 s 20
Rules of Court 2012 O 15 r 16, O 18 r 19, 19(1)(a), (1)(b), (1)(d)

Shanker Sundaram (SK Sundaram & Partners) for the plaintiff.
Syahidah Hanum bt Mohd Ghazali (Nurwati Mohamed Mokhtar with her) (Syahidah Sharul & Marsyara) for the first defendant.
Mohd Azhar bin Hamzah (Senior Federal Counsel, Attorney General's Chambers) for the second, third and fourth defendants.

Mohd Arief JC:

INTRODUCTION

[1] The defendants have filed the following notice of applications to strike out the plaintiffs' claim against them in encls 13 and 18. Enclosure 13 is the application to strike out filed by the first defendant under O 18 rule 19(1)(a), (b), and (d) of the Rules of Court. Enclosure 18 is the application by the rest of the defendants also under O 18 r 19(1)(a) or under (b) or (d) of the Rules of Court 2012.

[2] The defendants opine that:

(a) that the statement of claim filed against them do not disclose a reasonable cause of action against them;

(b) the claim is scandalous, frivolous or vexatious; and

(c) that the claim is an abuse of process of court.

[3] The plaintiffs' claim against the defendants as contained in the statement of claim is summarised as follows:

(a) the claim is filed by the plaintiffs as representatives of an association known as 'Pertubuhan Hindudharma Malaysia' and the 'Majlis Belia Hindu Malaysia';

(b) the claim is premised on words and statements that were allegedly uttered by the first defendant on YouTube and on Facebook. The alleged statements are reproduced by the plaintiffs in paras 18 of the statement of claim;

(c) the plaintiffs allege that the said statements have harassed Malaysians Hindus and have oppressed the Hindu religion in Malaysia;

(d) the plaintiffs further allege that they have received numerous calls complaining of the statements made by the first defendant;

(e) they also believe that the first defendant is a threat to the safety, wellbeing and to the harmony of Malaysian society;

(f) the plaintiffs have since lodged police reports with the second defendant, but the said defendant failed to take any relevant action against the first defendant;

(g) as a result of which the plaintiffs allege the following against the first defendant:

(i) that the first defendant is guilty of negligence by maliciously and with bad faith to disparage or defame the Hindu religion;

(ii) that the first defendant is guilty of negligence in trying to spread false information of the Hindu religion; and

(iii) that the first defendant had negligently disparaged Hindus and the Hindu religion.

(iv) that the first defendant had caused racial conflict within Malaysia.

(h) the plaintiffs' claim against the second defendant is for the alleged failure to act against the first defendant under s 20 of the Police Act 1967.

(i) the plaintiff's claim against the third to fourth defendants are also premised on the failure to act against the second defendant and their vicarious alleged failure to stop the alleged harassment, insult, or disparagement against the Hindu religion andand/oror Malaysian Hindus; and

(j) the plaintiffs have also prayed for the remedies contained in paras 31 of the statement of claim.

DECISION OF THIS COURT

[4] Having considered the notice of applications, affidavits, submissions, and the pleadings filed by the litigants, I find that this is a suitable case for this court to exercise its powers to strike out the claim against the defendants.

[5] I find that the plaintiffs do not have a valid claim against the defendants

A and that this claim is frivolous and constitutes an abuse of process of this court.

[6] My reasons for allowing the defendants applications are stated in the following paras.

B THE LAW ON STRIKING OUT A PLEADING

[7] It is trite law that I should only exercise my power to strike out the writ and the statement of claim if it is shown that the claim is so obviously unsustainable that it should be dismissed.

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[8] The leading authority that lays down the applicable principles in relation to the powers to strike out a pleading or an originating summons is *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36; [1993] 4 CLJ 7 where Mohamed Dzaiddin bin Hj Abdullah SCJ stated:

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> The principles upon which the court acts in exercising its power under any of the four limbs of O 18 r 19(1) of the Rules of the High Court are well settled.
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> E It is only in plain and obvious cases that recourse should be had to the summary process under this rule (per Lindley MR in *Hubbuck v Wilkinson* [1899] 1 QB 86, p 91), and this summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it 'obviously unsustainable' (*Attorney-General of Duchy of Lancaster v L & NW Ry CO* [1892] 3 Ch 274 (CA)). It cannot be exercised by a minute examination of the documents and facts of the case, in order F to see whether the party has a cause of action or a defence (*Wenlock v Moloney* [1965] 1 WLR 1238; [1965] 2 All ER 871 (CA)). The authorities further show that if there is a point of law which requires serious discussion, an objection should be taken on the pleadings and the point set down for argument under O 33 r 3 (which is in para materia with our O 33 r 2 of the Rules of the High Court) (*Hubbuck v Wilkinson*). The court must be satisfied that there is no reasonable cause G of action or that the claims are frivolous or vexatious or that the defences raised are not arguable.

[9] I also refer to the judgment of the Court of Appeal in *Pemilik-Pemilik dan/atau Pencarter-Pencarter Demis Tongkang atau Vesel 'Wantas 17' v Pemilik-Pemilik Kapal atau Vesel 'My Ferry 2'* [2021] MLJU 738; [2021] 1 LNS 666 where Lee Heng Cheong JCA stated:

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> [16] A claim may be struck out if it is obviously unsustainable *Bandar Builder Sdn Bhd v United Malayan Banking Corporation Berhad*).
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> I [17] Given the nature and context of the instant striking out application, a reference to the following passage from the Court of Appeal decision in *Tuan Haji Ishak bin Ismail v Leong Hup Holdings Bhd and other appeals* [1996] 1 MLJ 661; [1996] 1 CLJ 393, on a striking out application made under Order 18 r 19 of the former Rules of High Court 1980, is both apt and instructive:

The words 'plain and obvious' also need clarification. This case involved complex questions of company law. What may be 'plain and obvious' to a specialist in this field may not be so to another who does not have this specialised knowledge. I therefore feel obliged to state that the standard here is an objective one and implies that the perception required here is that of a person who has the required expertise. Support for this view can be found in *McKay v Essex Area Health Authority* [1982] 2 All ER 771, where it was held that *the right course was for the court to strike out a claim, even though it required a long and elaborate hearing before the court was satisfied that there was no cause of action, because the plaintiff was entitled to be relieved of the objection to meet it.*

[10] I also remind myself that I should consider the claim and the affidavit evidence in totality to determine whether there exists a reasonable cause of action that ought to be referred to at trial. The power to strike out should be exercised sparingly. This power may not be suitable if a minute examination of documents or facts is required to determine if there is a valid cause of action.

[11] However, this does not mean that this court should accept any allegation raised in affidavits uncritically. I refer to the celebrated judgment of Mohd Azmi SCJ in *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400:

> On the treatment of conflict of evidence on affidavits, Lord Diplock speaking for the Privy Council in *Eng Mee Yong & Ors v Letchumanan* [1979] 2 MLJ 212; [1979] 1 LNS 18 had this to say at p 217:
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> > Although in the normal way it is not appropriate for a judge to attempt to resolve conflicts of evidence on affidavit, this does not mean that he is bound to accept uncritically, as raising a dispute of fact which calls for further investigation, every statement on an affidavit however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently improbable in itself it may be.
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> Although Lord Diplock was dealing with an application for removal of caveat in that particular case, we are of the view that the above principle of law is relevant and applicable in all cases where a judge has to decide a case or matter on affidavit evidence.

WHY I SAY THIS IS AN OBVIOUSLY UNSUSTAINABLE CASE JUSTIFYING THE EXERCISE OF THE POWERS UNDER O 18 R 19 OF THE RULES OF COURT 2012

[12] I refer to the judgment of Lee Heng Cheong JCA in *Pemilik-Pemilik dan/atau Pencarter-Pencarter Demis Tongkang atau Vesel 'Wantas 17' v Pemilik-Pemilik Kapal atau Vesel 'My Ferry 2'* [2021] MLJU 738; [2021] 1 LNS 666 where His Lordship stated:

> [43] It is apposite to define the phrase 'cause of action'. It means 'simply a factual

A situation the existence of which entitles one person to obtain from the court a remedy against another person': per Diplock LJ in *Letang v Cooper* [1964] 2 All ER 929 at p 934. See also *Lim Kean v Choo Koon* [1970] 1 MLJ 158; [1969] 1 LNS 94, *Nasri v Mesah* [1971] 1 MLJ 32; [1970] 1 LNS 85 (FC), *Saw Gaik Beow v Cheong Yew Weng & Ors* [1989] 3 MLJ 301; [1989] 1 LNS 75, *Newacres Sdn Bhd v Sri* B *Alam Sdn Bhd* [1991] 3 MLJ 474; [1991] 1 CLJ Rep 321 (SC), and *Credit Corporation (M) Bhd v Fong Tak Sin* [1991] 1 MLJ 409; [1991] 1 CLJ Rep 69 (SC), as found in *Malaysian Court Practice* 2007 Desk Ed LexisNexis at p 144.

C WHETHER THERE EXISTS A CLAIM FOR DEFAMATION AGAINST A GROUP OF INDIVIDUALS OR AGAINST A RELIGION — CLAIM AGAINST FIRST DEFENDANT

[13] The pleaded case against the first defendant is premised on a claim pertaining to the statements of words that were allegedly uttered or published D by the first defendant and reproduced at para 18 of the statement of claim. Essentially, the plaintiffs contend that the words uttered by the first defendant could cause hatred against other religions in Malaysia, especially that against Hindus and the first defendant's action could cause ridicule against Hindus in Malaysia.

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[14] This allegation is further elaborated in paras 19 to 27(a)–(d) of the plaintiffs' statement of claim.

F **[15]** My understanding of the claims appearing in the said paras, in particular paras 18 to 26, relates to a claim for libel or slander against the first defendant for statements that the plaintiffs say disparage or defame the Hindu religion or against Malaysian Hindus. Essentially, the plaintiffs contend that the statements uttered by the first defendant have the tendency to lower the G Hindu religion, Hindus or Malaysian Hindus in the estimation of right-thinking members of society generally or may expose them to hatred, contempt or ridicule.

[16] Therefore, the first question that I must consider is whether such a H cause of action is recognised under Malaysian law in any form whatsoever.

[17] To answer this question, I am guided by the decision of one of Malaysia's eminent jurists, Wan Yahya J (as he then was) in *Atip bin Ali v Josephine Doris Nunis & anor* [1987] 1 MLJ 82; [1986] CLJ Rep 283.

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[18] In that case, the plaintiff who was a member of UMNO had instituted proceedings against the defendants, including the late Karpal Singh, for libel on behalf of himself and for other members of the Alai branch in the Kota Melaka UMNO division. The claim for libel was filed by the plaintiff for

defaming or disparaging the reputation of UMNO, and the State Government of Melaka. A

[19] In striking out the claim against defendants, Wan Yahya J stated:

Even on the assumption that there exists sufficient nexus between the plaintiff and the applicant herein, the plaintiff nevertheless cannot maintain this libel suit against the applicant. Defamation is a personal action maintainable by the person defamed and not by individuals who are remotely related to him. According to *Halsbury's Laws of England* (4th Ed Vol 28) p 13: B

> *Plaintiff must be personally defamed. The proper purpose of an action of libel or slander is to vindicate the reputation of the person defamed, and accordingly the proper and only party to bring the action is the person actually and personally defamed*. [1944] AC 116; [1944] 1 All ER 495 (HL). Thus, it is not enough that the words reflect on the plaintiff's property, there must also be an imputation against the plaintiff personally, for example, that he has knowingly sold defective goods. See para 42, post. C D

There is yet a further requirement which the plaintiff must, and in this case failed to prove namely the words were published about him. Mr Karpal Singh quoted from Duncan and Neill on *Defamation* 2nd Ed, the following words of AL Smith MR in *Sadgrove v Hole* appearing on p 22: E

> The plaintiff to succeed in the action must prove a publication of and concerning him of libellous matter, and if he does not satisfy the onus of proof which is on him in this respect there is no cause of action.

Lastly, I am of the view that representative proceedings cannot be taken in defamation proceedings. No representative action is normally allowed to establish the right of numerous persons to recover damages as the sole relief claimed. In a defamation suit the ground of liability for damages must necessarily differ from one person to another. In this liable suit not every member of the Alai UMNO Branch was present when the words were uttered and likewise the same remarks were not used on each of the members on every occasion. These remarks, as could be seen in the statement of claim, were allegedly uttered in different places ie mosque, restaurants and ceramahs and at different times. It is too much to expect this court to accept that every member of the Alai UMNO Branch was present and had suffered degradation of identical magnitude and at the same time and place. F G

The view that representative action cannot lie where the sole relief sought is damages has been expressed in the case of *Markt & CO Ltd v Knight Steamship Company Limited* [1910] 2 KB 1021 by Fletcher Moulton LJ as follows: H

> But the writs even as proposed to be amended fail to comply with Lord Macnaghten's interpretation of the rule in another and most essential particular The relief sought is damages. *Damages are personal only. To my mind no representative action can lie where the sole relief sought is damages, because they have to be proved separately in the case of each plaintiff, and therefore the possibility of representation ceases. It is true that in Duke of Bedford v Ellis [1901] AC 1 there was the claim for damages but that was only a personal claim by the named plaintiffs, and* I

> *it was solely on that ground that the action was held to be well framed so far as damages were concerned. The claims here are necessarily claims for damages only, and therefore no representative action can be brought.* To hold that a representative action can be brought in a case where the causes are mere independent actions for damages arising out of one and the same set of circumstances would be to confound r 1 with r 9, and, as I have said, the language of these two rules shows that they are intended to have wholly different applications.

For the aforesaid reasons, I find that the plaintiff/respondent has no cause of action against the defendant/applicant and that his suit is conspicuously unmaintainable.

[20] I also refer to the judgment of Balia Yusoh Wahi J (as he then was) in *Ong Boon Hua @ Chin Peng suing (in his own capacity as a representative of all members of Parti Komunis Malaya and other related parties) & Anor v Kerajaan Malaysia* [2010] 2 MLJ 794; [2010] 3 CLJ 125.

[21] In that case, the first plaintiff brought a suit in his own personal name and as a representative of all members of Parti Komunis Malaya as well as other related persons. The second plaintiff also sued in his capacity as the Secretary General of Parti Komunis Malaya.

[22] The plaintiffs had instituted proceedings against the Government of Malaysia for slander based on the statements published in *The Star* and in *The Sun* that had allegedly defamed the plaintiff personally and as representative of the members of Parti Komunis Malaya.

[23] The learned judge struck out the suit and, inter alia, held on the issue of capacity to sue for libel for a claim as representative of a group of individuals as follows:

> [18] The plaintiffs' pleading indicate that the first plaintiff is suing in his personal capacity as well as a representative of all members of the Parti Komunis Malaya and all the other relevant parties. It is unclear who these 'other relevant parties' are. This is an unknown party. He is also suing in his capacity as the Secretary General of the Parti Komunis Malaya.
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> [19] Lord Atkin in the House of Lords' case of *Knupffer v London Express Newspaper Ltd* [1944] AC 116 at p 122 remarked:
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> > The reason why a libel published of a large or indeterminate number of persons described by some general name generally fails to be actionable is the difficulty of establishing that the plaintiff was, in fact, included in the defamatory statement, for the habit of making unfounded generalizations is ingrained in ill-educated or vulgar minds, or the words are occasionally intended to be a facetious exaggeration. Even in such cases words may be used which enable the plaintiff to prove that the words complained of were intended to be published of each member of the group, or at any rate, of himself.

[20] In *Atip Ali v Josephine Doris Nunis & Anor* [1987] 1 MLJ 82; [1986] 1 CLJ 320; [1986] CLJ Rep 283 Wan Yahya J after quoting *Knupffer v London Express News paper Ltd* stated:

> Lastly, I am of the view that representative proceedings cannot be taken in defamation proceedings. No representative action is normally allowed to establish the right of numerous person to recover damages as the sole relief claimed. In a defamation suit the ground of liability for damages must necessarily differ from one person to another

[21] In the said case, His Lordship also referred to *Daya v Param Sukh* [1888] 1 LR 11 All 104 and *Brahmana v Ramakrishnama* [1894] 1 LR 18 Madras 250. Defamation involves a right in personam and close relationship with the person defamed alone will not give rise to the right on the part of other persons to sue the defendant.

[22] The first plaintiff's attempt of bringing this action as a representative of all members of the Parti Komunis Malaya and all other relevant parties is therefore misconceived.

[24] For the reasons above stated, it is my conclusion that the statement of claim should be struck out. This is a plain and obvious case which I can say at once that the statement of claim as it stands is insufficient to entitle the plaintiffs to the reliefs claimed. The defendant's application in encl 21 is hereby allowed in the terms of prayers (1) and (4).

[24] With regard to the plaintiff's claim against the first defendant that appears in para 27(a)–(d) of the statement of claim, I note that the plaintiffs allege that the first defendant is guilty of negligence by causing disrepute to the Hindu religion and Malaysian Hindus and did provide particulars of the purported act of negligence.

[25] As I have alluded earlier, the particulars of the alleged negligence by the first defendant concerns the alleged statements uttered or published by the first defendant. I am of the view that the plaintiffs claim is akin to a claim for libel or slander but is intended to protect the reputation of the Hindu religion or those who profess the said faith in Malaysia.

[26] Therefore, based on my earlier findings, I do not believe that the plaintiffs have pleaded a valid cause of action against the first defendant. There is no such cause of action that is recognised under Malaysian law. The law of defamation does not extend to the protection of a religion or a group professing the said religious belief or even blasphemy.

[27] Even if I am wrong on the above, after undertaking my own research on the known common law, I could not find any recognised form of tort of negligence of the nature that is pleaded by the plaintiffs.

[28] The gist of the plaintiff's claim is that the first defendant's speeches or writings are blasphemous of the Hindu religion and causes harm to the emotional wellbeing of Malaysian Hindus. They also allege that his statements and writing may also cause discord within our multiracial society.

[29] This court appreciates the concern raised by the plaintiffs. However, Malaysian law as it stands, does not recognise the existence of a tort of blasphemy or any form of tort as pleaded by the plaintiffs. I could not find any case law or academic or judicial legal writing justifying the existence of such torts.

[30] Despite the lack of jurisprudence on this area, should this court then recognise such a duty and create a new field of tort that purportedly protects religious belief such as suggested by the plaintiff, especially when one considers arts 3 and 11 of the Federal Constitution.

[31] For this purpose, I must take heed of the judgment of Sir Robert Megarry VC in *Malone v Metropolitan Police Commissioner* [1979] Ch 344, on the issue of the whether there exists a tort for breach to the right of privacy under English common law:

> On the other hand, it is no function of the courts to legislate in a new field. The extension of the existing laws and principles is one thing, the creation of an altogether new right is another. At times judges must, and do, legislate; but as Holmes J once said, they do so only interstitially, and with molecular rather than molar motions: see *Southern Pacific CO v Jensen* (1917) 244 US 205, p 221, in a dissenting judgment. Anything beyond that must be left for legislation. No new right in the law, fully-fledged with all the appropriate safeguards can spring from the head of a judge deciding a particular case: only Parliament can create such a right. The most obvious recent example of this is the so-called deserted wife's equity to occupy the matrimonial home. There was much uncertainty as to the ambit and operation of this right, and whether it arose from desertion alone, or whether there was also a betrayed wife's equity, a battered wife's equity, and so on, or, for that matter, a deserted husband's equity. After some 15 years of controversy and litigation, with its accompanying burden of costs, in *National Provincial Bank Ltd v Hastings Car Mart Ltd* [1965] AC 1175 it was held that the equity had never existed. Parliament then enacted the Matrimonial Homes Act 1967, laying down a complete code which the courts could not possibly have laid down by way of judicial decision. *The fact that the code has its difficulties does not affect the matter: the point is that the Act dealt with a wide variety of circumstances, and provided a number of safeguards, in a way that no court could properly have done. Where there is some major gap in the law, no doubt a judge would be capable of framing what he considered to be a proper code to fill it; and sometimes he may be tempted. But he has to remember that his function is judicial, not legislative, and that he ought not to use his office to legislate in the guise of exercising his judicial powers*.
>
> *One of the factors that must be relevant in such a case is the degree of particularity in the*

right that is claimed. The wider and more indefinite the right claimed, the greater the undesirability of holding that such a right exists. Wide and indefinite rights, while conferring an advantage on those who have them, may well gravely impair the position of those who are subject to the rights. To create a right for one person, you have to impose a corresponding duty on another.

[32] The same sentiment was shared many years later by Lord Hoffmann in *Home Office v Wainwright and another* [2001] EWCA Civ 2081, where he stated:

> Counsel for the Wainwrights relied upon *Peck*'s case as demonstrating the need for a general tort of invasion of privacy. But in my opinion it shows no more than the need, in English law, for a system of control of the use of film from CCTV cameras which shows greater sensitivity to the feelings of people who happen to have been caught by the lens. For the reasons so cogently explained by Sir Robert Megarry in *Malone v Metropolitan Police Comr* [1979] Ch 344, this is an area which requires a detailed approach which can be achieved only by legislation rather than the broad brush of common law principle.

[33] Similarly, I believe it would not be appropriate for this court to create a new form of tort that has not been recognised by the jurisprudence of our courts or any courts within the Commonwealth. This task should be left to Parliament as it will require details that may only be filled in by legislation. For the above reasons, I allow the application by the first defendant in encl 13 with costs.

WHETHER THE PLAINTIFFS HAD PLEADED OR SHOWN A REASONABLE CAUSE OF ACTION AGAINST THE SECOND TO FOURTH DEFENDANTS

[34] The plaintiffs' claim against the second to fourth defendants are contained in the remaining paras of 27–30 of the statement of claim.

[35] The gist of the plaintiffs' claim against the second to fourth defendants relate to the alleged failure by the second defendant to take action against the first defendant under the Police Act for the alleged breach of the penal provisions under Malaysian law as well as for making statements against the Hindu religion and Malaysian Hindus. The plaintiffs also contend that this is against the fundamental rights under the Federal Constitution.

[36] I am of the view that the plaintiffs allege that the said defendants are in breach of their statutory duties under the Police Act, in particular s 20 of the Police Act 1967 or by virtue of the protection afforded by the Federal Constitution.

[37] The first question that I must consider is whether there exists a right of action for failure by the second defendant to take action against the first defendant under the Police Act.

[38] An important case that I must consider is the decision of Lord Browne-Wilkinson in *X (minors) v Bedfordshire County Council, M (a minor) v Newham London Borough Council, E (a minor) v Dorset County Council* [1995] 2 AC 633 where he stated:

> This category comprises those cases where the statement of claim alleges simply: (a) the statutory duty; (b) a breach of that duty, causing; and (c) damage to the plaintiff. The cause of action depends neither on proof of any breach of the plaintiffs' common law rights nor on any allegation of carelessness by the defendant.
>
> The principles applicable in determining whether such statutory cause of action exists are now well established, although the application of those principles in any particular case remains difficult. *The basic proposition is that in the ordinary case a breach of statutory duty does not, by itself, give rise to any private law cause of action. However a private law cause of action will arise if it can be shown, as a matter of construction of the statute, that the statutory duty was imposed for the protection of a limited class of the public and that Parliament intended to confer on members of that class a private right of action for breach of the duty.* There is no general rule by reference to which it can be decided whether a statute does create such a right of action but there are a number of indicators. *If the statute provides no other remedv for its breach and the Parliamentary intention to protect a limited class is shown, that indicates that there may be a private right of action since otherwise there is no method of securing the protection the statute was intended to confer*. If the statute does provide some other means of enforcing the duty that will normally indicate that the statutory right was intended to be enforceable by those means and not by private right of action: *Cutler v Wandsworth Stadium Ltd* [1949] AC 398; *Lonrho Ltd v Shell Petroleum CO Ltd (No 2)* [1982] AC 173. However, the mere existence of some other statutory remedy is not necessarily decisive. It is still possible to show that on the true construction of the statute the protected class was intended by Parliament to have a private remedy. Thus the specific duties imposed on employers in relation to factory premises are enforceable by an action for damages, notwithstanding the imposition by the statutes of criminal penalties for any breach: see *Groves v Lord Wimborne* [1898] 2 QB 402.
>
> Although the question is one of statutory construction and therefore each case turns on the provisions in the relevant statute, it is significant that your Lordships were not referred to any case where it had been held that statutory provisions establishing a regulatory system or a scheme of social welfare for the benefit of the public at large had been held to give rise to a private right of action for damages for breach of statutory duty. Although regulatory or welfare legislation affecting a particular area of activity does in fact provide protection to those individuals particularly affected by that activity, the legislation is not to be treated as being passed for the benefit of those individuals but for the benefit of society in general. Thus legislation regulating the conduct of betting or prisons did not give rise to a statutory right of action vested in those adversely affected by the breach of the statutory provisions, ie

bookmakers and prisoners: see *Cutler* [1949] AC 398; *Reg v Deputy Governor of Parkhurst Prison, Ex parte Hague* [1992] 1 AC 58. The cases where a private right of action for breach of statutory duty have been held to arise are all cases in which the statutory duty has been very limited and specific as opposed to general administrative functions imposed on public bodies and involving the exercise of administrative discretions.

[39] I also have had the opportunity to read the judgment of the Australian High Court in *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1 where the court laid down guidelines or questions that could be considered in making the determination whether a private cause of action exists for failure to act in accordance to the powers provided under an Act of Parliament. Gleeson CJ stated:

> 93. In my opinion, therefore, in a novel case where a plaintiff alleges that a statutory authority owed him or her a common law duty of care and breached that duty by failing to exercise a statutory power, the issue of duty should be determined by the following questions:
>
> 1. was it reasonably foreseeable that an act or omission of the defendant, including a failure to exercise its statutory powers, would result in injury to the plaintiff or his or her interests? If no, then there is no duty;
> 2. by reason of the defendant's statutory or assumed obligations or control, did the defendant have the power to protect a specific class including the plaintiff (rather than the public at large) from a risk of harm? If no, then there is no duty;
> 3. was the plaintiff or were the plaintiff's interests vulnerable in the sense that the plaintiff could not reasonably be expected to adequately safeguard himself or herself or those interests from harm? If no, then there is no duty;
> 4. did the defendant know, or ought the defendant to have known, of the risk of harm to the specific class including the plaintiff if it did not exercise its powers? If no, then there is no duty;
> 5. would such a duty impose liability with respect to the defendant's exercise of 'core policy-making' or 'quasi-legislative' functions? If yes, then there is no duty; and
> 6. are there any other supervening reasons in policy to deny the existence of a duty of care (eg, the imposition of a duty is inconsistent with the statutory scheme, or the case is concerned with pure economic loss and the application of principles in that field deny the existence of a duty)? If yes, then there is no duty.
>
> 94. If the first four questions are answered in the affirmative, and the last two in the negative, it would ordinarily be correct in principle to impose a duty of care on the statutory authority.

[40] Regarding the issue of whether the powers of the police force to

undertake its investigation and its powers to apprehend any suspect, creates a statutory duty enforceable by way of a private cause of action can be seen in the judgment of the English courts in *Hill v Chief Constable of West Yorkshire* [1989] AC 53 and *Osman and another v Ferguson and another* [1993] 4 All ER 344.

[41] The facts of *Hill v Chief Constable of West Yorkshire Police* deals with the actions of the West Yorkshire Police in tackling the Yorkshire ripper that went on a killing spree in the late 70's and early 80's. Miss Hill was one of the victims and her estate, through her administrator, instituted proceedings for negligence against the West Yorkshire Police for negligence in failure to arrest the said serial killer in a timely manner and for pain and suffering caused by the said murderer

[42] The statement of claim filed by the estate of Miss Hill contends that the police force has a duty of care to use their best endeavors and exercise all reasonable care and skill to apprehend the perpetrator of the crimes and to protect the public. This is similar to the plaintiffs' pleaded although the alleged acts complained of against the first defendant would be substantially different.

[43] The defendant, West Yorkshire Police, filed to strike out the statement of claim under O 18 r 19 of the Rules of the Supreme Court. The House of Lords agreed with the defendants and struck out the suit. It is important that I reproduce parts of the judgment of Lord Keith of Kinkel that explained why the House of Lords found that, for reasons of public policy, the police owed no duty of care to members of the public to apprehend an alleged criminal:

> Lord Keith of Kinkel
>
> The question of law which is opened up by the case is whether the individual members of a police force, in the course of carrying out their functions of controlling and keeping down the incidence of crime, owe a duty of care to individual members of the public who may suffer injury to person or property through the activities of criminals, such as to result in liability in damages, on the ground of negligence, to anyone who suffers such injury by reason of breach of that duty.
>
> There is no question that a police officer, like anyone else, may be liable in tort to a person who is injured as a direct result of his acts or omissions. So he may be liable in damages for assault, unlawful arrest, wrongful imprisonment and malicious prosecution, and also for negligence. Instances where liability for negligence has been established are *Knightly v Johns* [1982] 1 WLR 349 and *Rigby v Chief Constable of Northamptonshire* [1985] 1 WLR 1242. Further, a police officer may be guilty of a criminal offence if he wilfully fails to perform a duty which he is bound to perform by common law or by statute: *Reg v Dytham* [1979] QB 722, where a constable was convicted of wilful neglect of duty because, being present at the scene

of a violent assault resulting in the death of the victim, he had taken no steps to intervene.

By common law police officers owe to the general public a duty to enforce the criminal law: *Reg v Commissioner of Police of the MetroPolis, Ex parte Blackburn* [1968] 2 QB 118. *That duty may be enforced by mandamus, at the instance of one having title to sue. But as that case shows, a chief officer of police has a wide discretion as to the manner in which the duty is discharged. It is for him to decide how available resources should be deployed, whether particular lines of inquiry should or should not be followed and even whether or not certain crimes should be prosecuted. It is only if his decision upon such matters is such as no reasonable chief officer of police would arrive at that someone with an interest to do so may be in a position to have recourse to judicial review. So the common law, while laying upon chief officers of police an obligation to enforce the law, makes no specific requirements as to the manner in which the obligation is to be discharged. That is not a situation where there can readily be inferred an intention of the common law to create a duty towards individual members of the public.*

[44] Lord Templeman in the same case also added:

The question for determination in this appeal is whether an action for damages is an appropriate vehicle for investigating the efficiency of a police force. The present action will be confined to narrow albeit perplexing questions, for example, whether, discounting hindsight, it should have been obvious to a senior police officer that Sutcliffe was a prime suspect, whether a senior police officer should not have been deceived by an evil hoaxer, whether an officer interviewing Sutcliffe should have been better briefed, and whether a report on Sutcliffe should have been given greater attention. The court would have to consider the conduct of each police officer, to decide whether the policeman failed to attain the standard of care of a hypothetical average policeman. The court would have to decide whether an inspector is to be condemned for failing to display the acumen of Sherlock Holmes and whether a constable is to be condemned for being as obtuse as Dr Watson. The plaintiff will presumably seek evidence, for what it is worth, from retired police inspectors, who would be asked whether they would have been misled by the hoaxer, and whether they would have identified Sutcliffe at an earlier stage. At the end of the day the court might or might not find that there had been negligence by one or more members of the police force. But that finding would not help anybody or punish anybody.

Moreover, if this action lies, every citizen will be able to require the court to investigate the performance of every policeman. If the policeman concentrates on one crime, he may be accused of neglecting others. If the policeman does not arrest on suspicion a suspect with previous convictions, the police force may be held liable for subsequent crimes. The threat of litigation against a police force would not make a policeman more efficient. The necessity for defending proceedings, successfully or unsuccessfully, would distract the policeman from his duties.

[45] The facts of the *Osman v Ferguson* also concerns with the failure of the police to apprehend a criminal which eventually caused the death of an innocent youth. The estate of the victim sued the Police Commissioner of the

Metropolitan Police for breach of the alleged duty of care owed by the police to the deceased.

[46] The English Court of Appeal, citing the earlier House of Lords decision, agreed to strike out the claim against the Metropolitan Police. Lord Justice McCowan, in delivering judgment of the Court of Appeal stated:

> When one looks at the particulars of negligence one sees, among others things, failure to apprehend him, failure to interview him, failure to search his home, failure to trace him through cars he hired and failure to link the theft of the shotgun with him. These all appear to me to be properly described as failures in investigation. Mr Hendy argues, however, that no further investigation was needed. All the police had to do was arrest him and keep him in custody and thereby suppress the crime that he in fact went on to commit. In fact Lord Keith speaks of the police function 'in the investigation and suppression of crime'. Mr Hendy says, however, that it is significant that Lord Keith does not refer to 'investigation or suppression' and that Lord Templeman does not use the word 'suppression' at all. I am afraid I am quite unable to accept that any of that is significant. In particular Lord Templeman is plainly thinking in terms of suppression of crime when he says: 'If the policeman does not arrest on suspicion a suspect with previous convictions, the police force may be held liable for subsequent crimes.' In my judgment investigation of crime is not meant to be narrowly interpreted and suppression includes the prevention of crime.
>
> Secondly, Mr Hendy submits that the ratio of the *Hill* case is that policy decisions are protected by public policy immunity but operational decisions are not and that, whereas the failures in the *Hill* case were of a policy nature, those in the present case were of an operational nature. In my judgment such a distinction is not to be supported by the speeches in the *Hill* case. Indeed I consider such a dividing line to be utterly artificial and impossible to draw in the present case. I should add that Mr Hendy placed reliance on the judgment of Henry J in the Canadian case of *Doe v Board of Commissioners of Police* 58 DLR 396. This does contain material supporting Mr Hendy's argument, but I do not find it helpful, first, because it seems to me to be directly contrary to the reasoning in the *Hill* case which is of course binding on us and, secondly, because the principle of public policy has not yet been introduced into the law of Canada.
>
> Mr Hendy's final point is that, if the class of victim is sufficiently proximate (as he says the victims here were) and sufficiently small, the public policy argument may not apply. I cannot accept this submission. Lord Keith plainly treats public policy as a separate point which is not reached at all unless there is a duty of care. If Mr Hendy were right, public policy would not be a separate argument at all because if a plaintiff were proved to be sufficiently proximate and a member of a sufficiently small class, public policy would not arise.
>
> In giving judgment in the present case, Sir Peter Pain said (on p 5 at letter E of the transcript):
>
> > Now my view is that the plaintiffs are going to have a distinctly uphill task ... But

> I do not think that there is so obviously no case that it would be right to strike the action out on those grounds. A

I do not take that view. In my judgment the House of Lords' decision on public policy in *Hill* dooms this action to failure as against the second defendant.

As a last resort, Mr Hendy sought to place reliance on the words of Sir Nicholas Browne-Wilkinson V-C in *Lonrho v Tebbit* [1991] 4 All ER 973 at p 979 letter F: B

> A claim should only be struck out in a plain and obvious case. The difficulty arises where, as in the present case, a claim to strike out depends upon the decision of one or more difficult points of law. In such a case, the judge should normally refuse to entertain such a claim to strike out. But, if in a particular case C the judge is satisfied that the decision of the point of law at that stage will either avoid the necessity for trial altogether or render the trial substantially easier and cheaper, he can properly determine such difficult point of law on the striking-out application.

Mr Hendy submitted that the present was a case depending on the decision of one or more difficult points of law and that we should therefore refuse to entertain the claim to strike out. I cannot agree. I consider this a plain and obvious case falling squarely within a House of Lords' decision. I would therefore allow the appeal. D

[47] Having considered the above decisions, I find that the Police Act does not create any statutory duty that is enforceable by a private cause of action as suggested by the plaintiffs. Neither is a tort of negligence recognised in law for failure to exercise the powers afforded to the police to investigate and detain any persons in accordance with Malaysian law. It is not for the plaintiffs to direct the police how to conduct their investigation. E F

[48] The powers afforded to the police is not created specifically to protect the plaintiffs or the class of persons they represent but it is given to the police to protect the public at large. G

[49] I reproduce s 20 of the Police Act 1967 for reference:

> 20(1) Every police officer shall perform such duties and exercise such powers as are by law imposed or conferred upon a police officer, and shall obey all lawful directions in respect of the execution of his office which he may from time to time H receive from his superior officers in the Force.
>
> (2) Where any duty, power or discretion is imposed or conferred by or under this Act or any other law on a police officer of any specified rank or holding any specified office, such police officer shall, in the performance of such duty or the exercise of such power or discretion, be subject to the orders and directions of any police officer I to whom he is directly subordinate, and any such last mentioned police officer, if the occasion arises and he deems it expedient so to do, shall himself perform any such duty or exercise any such power or discretion.
>
> (3) Without prejudice to the generality of the foregoing provisions or any other law,

A it shall be the duty of a police officer to carry out the purposes mentioned in subsection 3(3); and he may take such lawful measures and do such lawful acts as may be necessary in connection therewith, including —

(a) apprehending all persons whom he is by law authorized to apprehend;

B (b) processing security intelligence;

(c) conducting prosecutions;

(d) giving assistance in the carrying out of any law relating to revenue, excise, sanitation, quarantine, immigration and registration;

C (e) giving assistance in the preservation of order in the ports, harbours and airports of Malaysia, and in enforcing maritime and port regulations;

(f) executing summonses, subpoenas, warrants, commitments and other process lawfully issued by any competent authority;

D (g) exhibiting information;

(h) protecting unclaimed and lost property and finding the owners thereof;Police 19

(i) seizing stray animals and placing them in a public pound;

E (j) giving assistance in the protection of life and property;

(k) protecting public property from loss or injury;

(l) attending the criminal courts and, if specially ordered, the civil courts, and keeping order therein; and

F (m) escorting and guarding prisoners and other persons in the custody of the police.

(4) A police officer shall when performing the duties mentioned in para (3)(m) be deemed to be a prison officer, and shall have all the powers, protection and privileges attaching to a prison officer.

G

[50] Finally, I refer to the decision of the Federal Court in *Kerajaan Malaysia & Ors v Lay Kee Tee & Ors* [2009] 1 MLJ 1; [2009] 1 CLJ 663 where Nik Hashim FCJ held:

H [36] Not too long ago attempts to impose a common law duty even in cases where there is statutory duty has consistently not found favour with the courts. In *Stovin v Wise* [1996] AC 923 the House of Lords said at p 953:

... If the policy of the Act is not to create a statutory liability to pay compensation, the same policy should ordinarily exclude the existence of a common law duty of care.

I [37] This principle was applied in *Gorringe v Calderdate Metropolitan Borough Council* [2004] 2 All ER 326 where the House of Lords opined at p 336:

[25] In the absence of a right to sue for breach of the statutory duty itself, *it would in my opinion have been absurd to hold that the council was nevertheless under a*

> *common law duty to take reasonable care* to provide accommodation for homeless persons whom it could reasonably foresee would otherwise be reduced to sleeping rough. And the argument would in my opinion have been even weaker if the council, instead of being under a duty to provide accommodation, merely had power to do so. (Emphasis added.)

[38] In *Capital and Counties plc v Hampshire County Council & Ors* [1997] 2 All ER 865 the English Court of Appeal reiterated the principle in *Gorringe*, when it heard jointly three appeals concerning delay in action on the part of the fire fighting authorities. The claims were struck out on the ground of no cause of action. On appeal, the Court of Appeal affirmed the decision and applied *East Suffolk Rivers* and ruled at p 878:

> In our judgment the fire brigade are not under a common law duty to answer the call for help and are not under a duty to take care to do sO If therefore they fail to turn up or fail to turn up in time because they have carelessly misunderstood the message, got lost on the way or run into a tree, they are not liable.

[39] Thus, having regard to the foregoing reasons, the Court of Appeal was erroneous in concluding that this case was inappropriate to be summarily struck out. The respondents' case was so untenable and doomed to failure both on the facts and the law. The striking out order of the respondents' action under O 18 r 19(1) of the RHC on the grounds advanced by the appellants was therefore correct.

[51] Therefore, I do not find that the plaintiffs have pleaded a reasonable cause of action against the second to fourth defendants. Having considered the Police Act and other provisions under the Criminal Procedure Code as well as the Penal Code, I do not find the existence of any right to institute a private claim to enforce the powers afforded to the police under the aforesaid legislation. The relevant acts do not provide a private civil remedy against the second to fourth defendants, and it would also be absurd for this court to impose a common law duty of reasonable care to the plaintiffs.

[52] I find that there is no common law duty to act immediately on the reports by the plaintiffs or any such person. It is up to the police and the relevant authorities to act based on the complaints lodged.

[53] I adopt the position adopted by the courts in England and Wales as referred to earlier, although they are not binding on this court. I find that it is not in the interest of the Malaysian public to impose such duties against the police to act at the whims and fancies of an individual or group of individuals. The power to investigate and undertake all necessary action lies at the discretion of the police. There is sufficient protection afforded under law such as judicial review and other processes available to prevent abuse and to address redress against the police. It would be incorrect for this court to create another avenue that Parliament did not intend. Such a task should be left to Parliament.

[54] Given the above, I find that the claim is frivolous, vexatious and is an abuse of process of this court. I, therefore, allow the second to fourth defendants application in encl 18 to strike out the claim with costs.

ORDER 15 R 16 OF THE RULES OF COURT 2012

[55] One final issue I would like to address concerns O 15 r 16 of the Rules of Court 2012 which states:

> 16. No action or other proceeding shall be open to objection merely on the ground that a declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether or not consequential relief is or could be claimed.

[56] I have considered this provision and the decision of the English Court of Appeal in *Guaranty Trust Co of New York v Hannay & Co* [1915] 2 KB 536 as well as to the decision of our courts in *Ledchumanan Nagappan v R Nadarajah & Ors* [1993] MLJU 304; [1993] 4 CLJ 253 and *Lim Cho Hock v Government of the State of Perak, Menteri Besar, State of Perak and President, Municipality of Ipoh* [1980] 2 MLJ 148.

[57] Eusofee Abdoolcader J (as he then was) in *Lim Cho Hock v Government of the State of Perak, Menteri Besar, State of Perak and President, Municipality of Ipoh* [1980] 2 MLJ 148, had this to say on the powers of courts to grant declaratory orders:

> Some flexibility is desirable and sometimes, although an issue is theoretical, the declaration of the court may be necessary and beneficial and perhaps even useful only if given before a dispute has actually arisen for the guidance of the persons concerned in their future conduct. In such cases, the courts treat a theoretical issue as if it were a real one. The jurisdiction to grant declarations is extremely wide. Lord Sterndale MR said in *Hanson v Radcliffe Urban District Council* [1922] 2 Ch 490, (at p 507): *'The power of the court to make a declaration … is now almost unlimited; I might say only limited by its own discretion'. And this was affirmed by the Privy Council in Ibeneweka v Egbuna [1964] 1 WLR 219, p 225 where Viscount Radcliffe said (at p 225): '… the power to grant a declaration should be exercised with a proper sense of responsibility and a full realisation that judicial pronouncements ought not to be issued unless there are circumstances that call for their making. Beyond that there is no legal restriction on the award of a declaration'. I do not think that the issue raised in these proceedings is theoretical in the strict sense of the word or that it is premature. If illegal action is threatened or likely, the proceedings are properly constituted* (*Pharmaceutical Society of Great Britain v Dickson* [1970] AC 403).
>
> *There must, of course, be a concrete and real cause before the court and not an abstract or hypothetical question*, and I think that the plaintiff is entitled to raise the question of the appointment of the Menteri Besar as President of the Council in the light of the specific provisions of the Act he relies on. It is in the public interest that this issue be resolved at an early date, and that is why I summoned counsel to arrange as early

a hearing of this action as possible immediately after the close of pleadings. I cannot accept the argument that the matter only becomes concrete when the circumstances envisaged in ss 10(7) and 165(1) of the Act arise or their provisions come to be applied. There is no justification for the contention that the present state of affairs is in posse and not in esse and therefore theoretical, abstract, hypothetical, premature or academic, whichever it is, in relation to the declarations asked for, and *I would think that the mere appointment now assailed by the plaintiff in the light of the two provisions of the Act referred to raises a present and substantive issue for determination by the court. I can see no reason why it would not have been equally open to the defendants or one or more of them to apply for a declaration, if it was thought necessary, to resolve the doubts and controversy engendered by the appointment.* Over the issue before me in these proceedings there has been in a tropical sense much beating of drums and some exchange of fire, and it is evident that only by a curial determination, whichever way it goes, will the one be silenced and the other cease.

[58] Nevertheless, I am of the view that a plaintiff seeking a declaratory order from court must still be clothed with the necessary locus or a right under law that entitles him to seek redress. I refer to the decision of Idris bin Hj Yusoff J in *Tengku Jaafar bin Tengku Ahmad v Karpal Singh* [1993] 3 MLJ 156; [1993] 4 CLJ 183.

[59] In that case, His Lordship had eruditely explained the legal position on locus standi in an application for a declaratory relief as follows:

Ground (a) — The question of locus standi. In Malaysia the question of locus standi has been the subject of a series of judicial interpretation after considering a good number of English authorities — it dates back to the English case of *Boyce v Paddington Borough Council* [1903] 1 CH 109. In *Karpal Singh v Sultan of Selangor* [1988] 1 MLJ 64, Abdul Hamid CJ (Malaya) (as he then was) elaborates the concept of and the law on locus standi. He firmly says 'an action may not be brought to court by a stranger to it'. He also explains the various approaches that may be adopted by the court in deciding the question of locus standi. One approach is to ask whether the plaintiff has 'a cause of action'. Another approach is to determine whether the plaintiff can establish a 'right' which the court may declare. Yet another approach is to require the plaintiff to demonstrate 'a special injury' resulting from the subject matter of the declaration. A fourth approach requires the plaintiff to have an 'interest' in the subject matter of the declaration to be litigated. A final approach leaves the question of standing to be determined by the court in the exercise of its discretion. The concept of and the law on locus standi were considered in great detail by the Supreme Court in *Government of Malaysia v Lim Kit Siang* [1988] 2 MLJ 12. In that case the Supreme Court traced the development of such law in England starting with *Boyce*'s case followed by a number of other cases which evinced a clear need to liberalise such law, and which finally culminated in the introduction of O 53 of the United Kingdom Supreme Court Rules. The position in Malaysia is somewhat different and the Supreme Court in Government of Malaysia's case by a majority of 3–2 decided not 'to depart from the rule of locus standi accepted by the highest Court in England prior to O 53'. This is because O 53 has not been accepted in Malaysia and the court has therefore to fall back on

Boyce's case. Buckley J in *Boyce*'s case stated as follows: A plaintiff can sue without joining the Attorney-General in two cases: first, where the interference with the public right is such as that some private right of his is at the same time interfered with (eg where an obstruction is so placed in a highway that the owner of premises abutting upon the highway is specially affected by reason that the obstruction interferes with his private right to access from and to his premises to and from the highway); and, secondly, where no private right is interfered with, but the plaintiff, in respect of his public right, suffers special damage peculiar to himself from the interference with the public right. The Supreme Court also considered the two landmark cases in Malaysia on locus standi namely: *Lim Cho Hock v Government of State of Perak and Ors* [1980] 1 MLJ 148 and *Tan Sri Hj Othman Saat v Mohamed b. Ismail* [1982] 2 MLJ 177 in which it was said in the later case; *The sensible approach in the matter of locus standi in injunctions and declarations would be that as a matter of jurisdiction, an assertion of an infringement of contractual or a proprietary right, the commission of a tort, a statutory right or the breach of a statute which affects the plaintiff's interests substantially or where the plaintiff has some genuine interest in having his legal position declared, even though he could get no other relief, should suffice.* In the above two cases the Court held that the plaintiffs have the necessary locus standi on the basis that they had genuine private interest to be furthered and protected. *As appears to me from these two cases to possess locus standi it requires that the applicant should be seeking to protect or vindicate an interest of his own.*

... I hold that the plaintiff, purely on the ground of being of the Malay race and a subject of the Sultan of Kelantan, *is not clothed with the necessary locus standi since there does not seem to be any form of interference of his private right beyond that of any other Malays and subjects of the Sultan of Kelantan, a qualification which is essentially required to be proved.*

[60] I also refer to the decision of the Court of Appeal in *Haris Fatillah bin Mohd Ibrahim v Suruhanjaya Pilihan Raya Malaysia* [2017] 3 MLJ 543; [2017] 3 CLJ 88.

[61] The facts of the case are as follows. The appellant was a registered voter in the Parliamentary Constituency of Petaling Jaya Selatan sought to obtain information from the respondent concerning a proposed delineation exercise. The respondent refused to provide the information sought and the appellant applied to the High Court by way of an originating summons seeking a series of declaratory orders concerning to the said delineation exercise. The High Court dismissed the originating summons and this was confirmed by the Court of Appeal.

[62] Zamani A Rahim JCA delivering the judgment of the Court of Appeal stated:

[20] The appellant must first show to the court that he has the necessary locus standi or standing in that he has a proper or tangible interest to seek the declarations. The traditional test for standing is set out by Buckley J in *Boyce v Paddington Borough*

Council [1903] 1 Ch 109 at p 114: A plaintiff can sue without joining the Attorney General in two cases: first where the interference with the public right is such as that some private right of his at the same time interfered with (eg where an obstruction is so placed in a highway that the owner of premises abutting upon the highway is specially affected by reasons that the obstruction interferes with his private right of access from and to his premises to and from the highway); and, secondly, where no private right is interfered with but the plaintiff in respect of his public right, suffers special damage peculiar to himself from the interference with the public right.

[21] In the originating summons and in para 1 of his affidavits in support of the application, the appellant merely identifies himself as a registered voter of Petaling Jaya Selatan Parliamentary Constituency and Bukit Gasing State Constituency.

[22] The appellant has not pleaded that there was any interference with his public right such that it also interfered with his private right or that he had suffered some special damage peculiar to himself from such interference. Nowhere in the pleadings does the appellant identify a controversy or a ripe issue between himself and the respondent or that his constitutional right has been infringed.

[23] *It is to be noted that the declaratory reliefs that the appellant are seeking are not for himself but in general term for 'aggrieved person' not identified or made plaintiff in the application. The originating summons and affidavit neither reflect that it is a representative action.*

[24] *There is no statement of fact in the appellant's affidavit to allege that his rights have been affected by the act of the respondent. There is also no allegation that the appellant's rights, if any, have been prejudiced by the act of the respondent.*

[25] In the instant case, what is the appellant's cause of action as disclosed from his pleading against the respondent? Clearly, there is no controversy between the appellant and the respondent, whether on the facts or in law. The application is clearly shorn of any cause of action against the respondent.

[63] I finally refer to the judgment of Abdoolcader J (delivering the judgment of the Federal Court) in *Tan Sri Haji Othman Saat v Mohamed bin Ismail* [1982] 2 MLJ 177 where His Lordship stated:

The short but pivotal point raised for determination in this appeal *relates to the capacity of the respondent to institute and maintain the proceedings instituted by him in this matter. This involves the question of his locus standi or standing to sue, scilicet, whether the instigator of an action has the right to bring the mechanism of the court into operation.*

Although counsel for the respondent indicated in the court below that he is proceeding under s 41 of the Specific Relief Act, this statutory provision cannot apply as no entitlement of the respondent to any legal character or status or right to property or denial thereof is in issue, and he now accepts in answer to us that the declarations are in fact sought under the provisions of O 15 r 16 of the Rules of the High Court 1980 and not s 41 of the Specific Relief Act. In *Lim Cho Hock v Speaker Perak Legislative Assembly* [1979] 2 MLJ 85, p 87 it was held (at p 87) that a plaintiff in an action under O 25 r 5 of the Rules of the High Court, 1957 (now O 15 r 16

of the Rules of the High Court 1980) need only establish that his legal interests are peculiarly affected. *Although it is not necessary for a plaintiff who seeks relief by way of declaratory judgment to show that he has a present cause of action, 'he must be somebody with such an interest in the subject-matter of the action as to justify his seeking relief (Wilson, Walton International (Offshore Services) Ltd v Tees & Hartlepools Port Authority* [1969] 1 Lloyds LR 120, *p 124). A private individual may sue for a declaration if he has a cause of action at common law or to protect a statutory right, or if he suffers or will suffer special damage as a result of the defendant's action.* In *Stockwell v Southgate Corporation* [1936] 2 All ER 1343, p 1351 Porter, J said (at p 1351) that the test was whether the plaintiffs were 'peculiarly affected'.

The locus classicus of course on this aspect is *Boyce v Paddington Borough Council* [1903] 1 Ch 109, 114 where Buckley J laid down (at p 114) a formula which has been treated with the respect generally reserved for statutes in relation to the conditions which must be satisfied before a private person can claim an injunction to protect a public statutory right:

> A plaintiff can sue without joining the Attorney-General in two cases: first, where the interference with the public right is such as that some private right of his is at the same time interfered with?; and, secondly, where no private right is interfered with, but the plaintiff, in respect of his public right, suffers special damage peculiar to himself from the interference with the public right.

The first limb of the exposition in Boyce [1903] 1 Ch 109, p 114 simply means that the availability of injunctions and declarations at the instance of an individual to protect private rights is not diminished where the threat to the private right also constitutes a threat to a public right. The second limb to the extent that it is read liberally would appear to include everyone with a legitimate grievance. The principle formulated in *Boyce* [1903] 1 Ch 109, 114 was applied and reaffirmed by the House of Lords in *Gouriet and Ors v Union of Post Office Workers* [1978] AC 435, pp 513 and 518 (passim, and especially at p 513 per Lord Edmund-Davies and p 518 per Lord Fraser of Tulleybelton).

On a general consideration of the authorities it would seem that the plaintiff in proceedings for a declaration need do no more than establish that he has a 'real interest' in the suit. This was the test propounded by Lord Dunedin in *Russian Commercial and Industrial Bank v British Bank for Foreign Trade Ltd* [1921] 2 AC 438, p 448 (at p 448) which has been quoted with approval in the High Court of Australia by Gibbs J, (now Chief Justice) in *Forster v Jododex Australia Proprietary Ltd* (1972) 127 CLR 421, p 438 (at p 438) and also in other recent cases adopting a similar approach on the basis of 'substantial interest'. The High Court of Australia held in *Australian Conservation Foundation Incorporated v Commonwealth of Australia & Ors* [1980] 28 ALR 257, pp 268, 276, 284 that *a plaintiff has no standing to bring an action to prevent the violation of a public right unless he has, at the same time, a private right of his own interfered with or suffered special damage peculiar to himself, and Gibbs J said that in the rule as to locus standi to enforce public rights, the words 'special damage peculiar to himself' should be regarded as equivalent to 'having a special interest in the subject-matter of the action'* (at pp 268, 276, 284). This *dictum* of Gibbs J, explaining the principle stated by Buckley J, in *Boyce* [1903] 1 Ch 109, p 114 was

applied by six of the judges in *Onus & Anor v Alcoa of Australia Ltd* [1981] 36 ALR 425.

[64] Given the above, I am of the view a plaintiff must still show to this court that 'he has a cause of action at common law' or the suit is intended 'to protect a statutory right' belonging to him or he has 'suffered or will suffer special damage as a result of the defendant's action'.

[65] The plaintiffs must show to this court that they were attempting to protect an interest of his own or an interference with their private right. I do not see such a cause of action based on the statement of claim filed by the plaintiff.

[66] As I have said earlier, I fail to see any valid common law cause of action against any of the defendants that have been pleaded by the plaintiffs. I also fail to seek any statutory right that is being enforced by the plaintiffs. The plaintiffs have also failed to plead that they have suffered or will suffer special damages because of the defendants' actions.

ORDERS OF THIS COURT

[67] For the above reasons, I allow the first to fourth defendants applications in encl 13 and 18 with costs.

Defendants' application allowed with costs.

Reported by Ahmad Ismail